Supreme Court, U.S.
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(2)

CASE NO. 94-556

THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1994

LAWRENCE MOORE,

PLAINTIFF/PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; SAN DIEGO ELECTRICAL PENSION TRUST; SAN DIEGO NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION; PAUL BLACKWOOD; THOMAS PRIDEMORE; JAMES WESTFALL; JOE HEISLER; DICK SMITH; TERRY GODSHALK; RON COOPER; JOE MANSOLILLO, ET AL.

DEFENDANTS/RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the Ninth Circuit Court of Appeals acted properly in dismissing an appeal by an appellant who voluntarily dismissed his case at the district court level and in concluding that the appeal was untimely due to the appellant's failure to file a notice of appeal within thirty (30) days of an order by the district court requiring appellant to post a $200,000.00 bond before permitting appellant to proceed further against appellees.

B. Whether the Ninth Circuit Court of Appeals acted properly in dismissing an appeal for lack of jurisdiction while awarding appellees their attorneys' fees incurred on appeal under Section 502(g) of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. §1132(g).

LIST OF ALL PARTIES

Plaintiff/Appellant/Petitioner, LAWRENCE MOORE, and Defendants/Appellees/Respondents INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, SAN DIEGO ELECTRICAL PENSION TRUST, SAN DIEGO ELECTRICAL HEALTH AND WELFARE TRUST, SAN DIEGO ELECTRICAL TRAINING TRUST, SAN DIEGO ELECTRICAL INDUSTRY EDUCATION AND MANPOWER DEVELOPMENT TRUST, LABOR MANAGEMENT COOPERATIVE FUND, SAN DIEGO CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, TOM PRIDEMORE, PAUL BLACKWOOD, WAYNE LOVIN, JIM WESTFALL, WILMER BASS, DICK SMITH, TERRY GODSHALK, JOE HEISLER, GEORGE ENGLAND, RAY ALTMEYER, JOHN SIMPSON, JIM ALYSWORTH, CHARLES WILDER, RON COOPER, DAVID ALLISON, KENNETH STUART, DAVID RASPOLICH, WAYNE VAN DER LINDEN, JACK ZWART, JIM ARCHER, GREG WEBB, MIKE SPARKS, JOE MANSOLILLO, J.J. BARRY, S.R. McCANN, DICK ROBBINS, and FISCHBACH & MOORE, INC.

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Memorandum entered by the United States Court of Appeals for the Ninth Circuit, C.A. No. 93-55287, on June 27, 1994. (Petitioner's Appendix, p. 86.)

STATEMENT OF JURISDICTIONAL GROUNDS

The Memorandum of the Court of Appeals was filed on June 27, 1994. Jurisdiction was proper in the United States District Court under 28 U.S.C. §1331 29 U.S.C. §412, and 29 U.S.C. §1132, et seq. Appellate jurisdiction was proper under 28 U.S.C. §1291. This Court has jurisdiction to hear this matter pursuant to 29 U.S.C. §1254(1).

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STATEMENT OF THE CASE

Petitioner LAWRENCE MOORE, in his ongoing attempt to remedy the wrongs allegedly perpetrated against him by the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 569, the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, and various officers of those entities (hereafter collectively referred to as the "UNION DEFENDANTS"), filed an action not only against the UNION DEFENDANTS, but also against the multi-employer trust funds which administer the pension, health and training benefits for the members of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 569 ("IBEW LOCAL 569").[1]

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[1] This brief is filed on behalf of INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569, SAN DIEGO ELECTRICAL PENSION TRUST, SAN DIEGO ELECTRICAL HEALTH AND WELFARE TRUST, SAN DIEGO ELECTRICAL TRAINING TRUST, SAN DIEGO ELECTRICAL INDUSTRY EDUCATION AND MANPOWER DEVELOPMENT TRUST, LABOR MANAGEMENT COOPERATIVE FUND, SAN DIEGO CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, TOM PRIDEMORE, PAUL BLACKWOOD, WAYNE LOVIN, JIM

In the instant case, MOORE filed suit against some thirty defendants, including the following entities: IBEW LOCAL 569, a local labor union and its officers and employees; the SAN DIEGO ELECTRICAL PENSION TRUST, SAN DIEGO ELECTRICAL HEALTH AND WELFARE TRUST, and the SAN DIEGO ELECTRICAL TRAINING TRUST, (hereinafter collectively referred to as the "TRUSTS"); the SAN DIEGO ELECTRICAL INDUSTRY EDUCATION AND MANPOWER DEVELOPMENT TRUST ("DEVELOPMENT TRUST") and the LABOR-MANAGEMENT COOPERATIVE FUND ("LMCF"); current and former trustees of the TRUSTS ("TRUSTEES"); current and former administrators of the TRUSTS; the SAN DIEGO CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, ("NECA") a multi-employer association and its current and

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WESTFALL, WILMER BASS, DICK SMITH, TERRY GODSHALK, JOE HEISLER, GEORGE ENGLAND, RAY ALTMEYER, JOHN SIMPSON, JIM ALYSWORTH, CHARLES WILDER, RON COOPER, DAVID ALLISON, KENNETH STUART, DAVID RASPOLICH, WAYNE VAN DER LINDEN, JACK ZWART, JIM ARCHER, GREG WEBB, MIKE SPARKS, and JOE MANSOLILLO.

former manager. This brief is filed on behalf of the TRUSTS, their TRUSTEES and administrators, DEVELOPMENT TRUST, LMCF, as well as NECA and its managers (hereinafter collectively referred to as the "TRUST DEFENDANTS").

On October 28, 1991, MOORE filed his original Complaint in this action, which named only the UNION DEFENDANTS and various union officers as parties to the action. Before the Complaint was served, MOORE filed an Amended Complaint on January 24, 1992, whereby the TRUST DEFENDANTS were added to the Complaint as named defendants for alleged violations of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. §1001, et seq.

In response to the Amended Complaint, UNION DEFENDANTS and TRUST DEFENDANTS filed a Motion to Dismiss, Motion for a More Definite Statement, and Motion to Strike portions of MOORE's Amended Complaint. Pursuant to the Court's Order Nunc Pro Tunc dated April 22,

1992, the District Court dismissed MOORE's allegations against the UNION DEFENDANTS without leave to amend and dismissed the ERISA claims under ERISA against the TRUST DEFENDANTS with leave to amend, ruling that MOORE's allegations were conclusory, vague and failed to state a valid claim against the TRUST DEFENDANTS. The Court allowed the Sixth cause of action to remain intact only as to two individual union agents, GREG WEBB and JAMES ARCHER, who had not been named in MOORE's previous actions. MOORE's request for a jury trial on the ERISA claims was stricken, as were his claims for general and punitive damages.

On May 20, 1992, MOORE filed his Second Amended Complaint which alleged similar labor law violations and breaches of the TRUST DEFENDANTS' fiduciary duties under ERISA. However, allegations regarding the violations of ERISA in MOORE's Second Amended Complaint were virtually identical to the allegations

previously deemed inadequate by the Court in ruling on Defendants' Motion to Dismiss MOORE's First Amended Complaint.

The UNION and TRUST DEFENDANTS filed a Motion to Dismiss, Motion for a More Definite Statement and Request for Sanctions in response to MOORE's Second Amended Complaint.

On July 27, 1992, before the scheduled hearing on UNION and TRUST DEFENDANTS' Motions to Dismiss MOORE's Second Amended Complaint, MOORE filed a Motion to Reconsider the Court's dismissal of his First Amended Complaint and Motion to Amend, along with a new proposed Second Amended Complaint (actually MOORE's third amended complaint). UNION DEFENDANTS and TRUST DEFENDANTS opposed MOORE's motions to reconsider and to amend on the grounds that MOORE's motions were untimely and improper. The court found at the hearing that MOORE's motion for reconsideration was not timely filed and that it did not contain any new or additional facts relative to the causes of

action which the court had given MOORE leave to amend. The court noted that the evidence MOORE offered as new was "just a regurgitation of the arguments that were previously made." Additionally, the court denied MOORE's Motion for leave to file a Second Amended Complaint (actually his third amended complaint), characterizing the proposed amended complaint as "extremely vague and incomprehensible, and would be clearly subject to motions to dismiss, or at least motions for a more definite statement." In ruling on UNION and TRUST DEFENDANTS' Motion to Dismiss MOORE's Second Amended Complaint, the Court found the causes of action against the TRUST DEFENDANTS to be "totally conclusory and ambiguous and incomprehensible."

Following the hearing, the Court entered an Order on September 10, 1992, denying MOORE's Motion for Reconsideration; denying MOORE's Motion to Amend his Complaint in accordance with his proposed Second Amended

Complaint (actually third amended complaint); granted UNION DEFENDANTS' and TRUST DEFENDANTS' Motion to Dismiss the Second Amended Complaint with leave to amend conditioned upon MOORE posting a cash or corporate surety bond in the amount of $200,000.00 in favor of the TRUST DEFENDANTS; stayed all further court proceedings and discovery as to the TRUST DEFENDANTS until MOORE posted a $200,000.00 cash or corporate surety bond; ordered MOORE to pay the reasonable attorneys' fees UNION and TRUST DEFENDANTS incurred for having to oppose MOORE's untimely and baseless Motion to Reconsider; and, stayed all remaining causes of action in MOORE's lawsuit until the attorneys' fees were paid by MOORE. (Petitioner's Appendix p. 8.)

Several months later, MOORE filed a further motion for leave to amend his complaint and a proposed seventy (70) page Third Amended Complaint (actually MOORE's

fourth amended complaint) without complying with the bond requirement or paying Defendants' attorneys' fees. The court denied MOORE's motion for leave to amend his complaint sua sponte because MOORE had not posted the bond or paid the attorneys' fees and was therefore, in violation of the court order.

Concurrently with the filing of his Motion for Leave to Amend his Complaint, MOORE filed an Application for Final Order, wherein he requested a dismissal of his action in its entirety.[2] MOORE subsequently filed a Notice of Motion and Ex Parte Application for Final Order along with a Declaration in Support of Application for Final Order. The Court

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[2] MOORE did not ask the court to dismiss the action with prejudice. He requested only that the action be dismissed in its entirety. Defendants were given no indication that MOORE wanted the action dismissed with prejudice for the purposes of appeal. The court sua sponte dismissed the case with prejudice.

granted MOORE's request to dismiss his own case on December 21, 1992, and entered a Final Judgment dismissing the case with prejudice. (Petitioner's Appendix, p. 65.)

On April 27, 1993, the Court granted UNION and TRUST DEFENDANTS' Motion to Determine Reasonable Attorneys' Fees and ordered MOORE to pay them the sum of $1,255.00 as reasonable attorneys' fees incurred by the UNION and TRUST DEFENDANTS in opposing MOORE's Motion to Reconsider pursuant to the September 10, 1992 order.

On January 4, 1993, MOORE filed a Notice of Appeal. Moore has previously indicated that the only issue in his appeal is whether he should be permitted to continue to prosecute his action without having to comply with the Court's order that he post a $200,000.00 bond and satisfy the Court's interlocutory award of attorney's fees.

The Ninth Circuit agreed with the TRUST DEFENDANTS' position and dismissed MOORE's

appeal as untimely, holding that MOORE should have filed a notice of appeal within thirty (30) days after the Court's order dismissing his Second Amended Complaint and requiring him to post a $200,000.00 bond before proceeding. The Court further found that MOORE is not entitled to appeal the dismissal of his case with prejudice because he voluntarily sought the dismissal. (Petitioner's Appendix, p. 86.)

Finally, the Court of Appeals affirmed the District Court's holding that his claims against the TRUST DEFENDANTS were "vague and conclusionary allegations lacking adequate foundation in either fact or law" which "unreasonably and vexatiously multiplied the proceedings in this matter." Accordingly, the Court ruled that the TRUST DEFENDANTS had satisfied the criteria of Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980) and awarded the TRUST DEFENDANTS their attorneys' fees incurred on appeal. The Court

of Appeals also remanded the decision as to the amount of attorneys' fees that should be awarded to TRUST DEFENDANTS to the district court. (Petitioner's Appendix, p. 86.)

ARGUMENT

A. The Court of Appeals Correctly Dismissed MOORE's Appeal by Refusing to Allow Him to Appeal the Dismissal of His Case Because He Voluntarily Requested a Final Order Dismissing the Case in Its Entirety.

The general rule is that a plaintiff may not appeal his own request for a dismissal of an action that he commenced. Evans v. Phillips, 4 Wheat. 73 (1819); United States v. Babbit, 104 U.S. 767 (1881). The Ninth Circuit held in Seidman v. City of Beverly Hills, 785 F.2d 1447, 1448 (9th Cir. 1986), "[a] plaintiff may not appeal a voluntary dismissal because it is not an involuntary adverse judgment against him." The court elaborated by holding, "having agreed to dismiss this action with prejudice, [the appellant] deprived this court of jurisdiction to consider his appeal." Id.

MOORE, himself, sought the dismissal of his case by filing an Application for Final Order. It is noteworthy that MOORE did not seek a dismissal with prejudice in his application. However, in granting MOORE's request for a final order, the court sua sponte dismissed MOORE's action with prejudice. It is now obvious that MOORE's sole purpose in applying for a final order was solely to resurrect the appeal period, since MOORE had previously allowed the period within which to file a notice of appeal upon the court's order requiring the posting of the bond to expire.

The Court granted MOORE's Application for Final Order on December 21, 1992, thereby dismissing his action with prejudice. The Defendants were led to believe a hearing was to be held on MOORE's request for a final order and his Third Amended Complaint on January 25, 1993, as noticed on MOORE's original Application for a Final Order.

However, the court ruled on MOORE's Application without hearing from Defendants because they received no notice from the court or from MOORE regarding the arbitrary removal of the January 25, 1993 hearing from the calendar. As a result, MOORE's action was dismissed without opposition from the UNION and TRUST DEFENDANTS, which would have demonstrated to the Court MOORE's true motivation in seeking a "final" order.

Only one exception exists for a plaintiff who voluntarily requests a dismissal to then appeal that dismissal.

> "As a general rule, neither party may appeal from an agreed judgment because it is not an involuntary adverse judgment. There is an exception, however, when the appellant's solicitation of the formal dismissal was designed only to expedite review of [a prior] order which had in effect dismissed appellant's complaint." Laczay v. Ross Adhesives, 855 F.2d 351, 351 (6th Cir. 1988), cert. denied, 489 U.S. 1014 (1990).

In order to qualify for this exception, the plaintiff must inform the court and the

opposing parties that he is seeking the dismissal in order to obtain appellate review of a prior order.

> "[Plaintiff] then had the responsibility to inform the court and opposing parties that he was seeking a final order of dismissal with prejudice for the sole purpose of obtaining an expeditious review of the prior order, and of reserving that right unequivocally in the stipulation or the order. Having done none of those things, the plaintiff did not preserve a right of appeal." Id. at 355.

The court in Laczay also held that before a plaintiff can appeal his own request for dismissal, he must have lost the case on its merits. "The basic requirement for appealability of a consent judgment is that the one proposing or soliciting it shall have lost on the merits and be only seeking an expeditious review. [Citation omitted.]" Id. (Emphasis added.)

MOORE has not met either of these requirements. He did not indicate his intent to appeal following the dismissal in any of

the many documents he filed requesting the final order. MOORE's proposed Final Order, his Declaration in Support of Application for Final Order and his Ex Parte Application for Final Order contain no mention of his desire to expedite an appeal.

In addition, MOORE did not lose on the merits of his case. As evidenced by the record, MOORE was never able to file a proper complaint in this action. Therefore, the merits were never reached by the court. The final judgment was granted solely because MOORE indicated he was unable to comply with the requirement that he post a $200,000.00 bond, as required under the court's order of September 10, 1992, not because he lost on the merits.

Because MOORE did not inform the court or the opposing parties of his desire to expedite an appeal and he did not lose his case on the merits, MOORE has failed to satisfy the requirements for the exception to the rule

that a plaintiff may not appeal his own voluntary request for a dismissal. Accordingly, the Court of Appeals properly concluded that it lacked jurisdiction to consider this appeal and therefore dismissed MOORE's appeal, holding that another avenue of appeal was available to MOORE; i.e. his right to appeal the order requiring him to post a bond.

B. **The Appellate Court Correctly Held that MOORE'S Failure to Timely File His Notice of Appeal Following Entry of the Order Requiring Him to Post the $200,000.00 Bond Constituted a Waiver of His Right to Appeal.**

The Order entered by the district court on September 10, 1992, which required MOORE to post a $200,000.00 cash or corporate surety bond, effectively ended MOORE's ability to proceed in this case. His failure to file a notice of appeal within the thirty day period following the entry of that order constitutes a waiver of his appeal rights in this case. The Court of Appeals agreed with the TRUST DEFENDANTS' position and determined that this

Order was immediately appealable as a collateral order under Riverhead Savings Bank v. National Mortgage Equity, Co., 893 F.2d 1109, 1114 (9th Cir. 1990) because it:

> "(1) conclusively determined that a bond was required before the matter could proceed; (2) resolved an important issue separate from the merits; and (3) was effectively unreviewable on appeal from the final judgment because Moore claims he could not afford to post the bond." Memorandum, Ninth Circuit Court of Appeals, Case No. 93-55287, June 27, 1994. (Petitioner's Appendix, p. 88.)

MOORE should have appealed the Court's order that effectively dismissed the action within the thirty day limit. The Court correctly found that his failure to exercise his right to appeal the order imposing the bond within the requisite time period constitutes a waiver by MOORE of his right to appeal. Accordingly, the Court of Appeals concluded that it lacked jurisdiction to review the matters raised by MOORE's Appeal.

C. The Court of Appeals Properly Exercised Jurisdiction By Sanctioning MOORE's Conduct and Awarding TRUST DEFENDANTS Their Attorneys' Fees Incurred on Appeal.

MOORE argues that the Ninth Circuit's holding that it lacks jurisdiction to review the merits of his appeal, prohibits the Court from exercising jurisdiction to award TRUST DEFENDANTS their attorneys' fees incurred on appeal. Contrary to MOORE'S assertion, the Ninth Circuit has inherent discretion to award such attorneys' fees, even if it lacks jurisdiction to review an appeal. The Ninth Circuit awarded attorneys' fees against MOORE as sanctions for his "unreasonable and vexatious claims" against the TRUST FUNDS. (Petitioner's Appendix, p. 91)

In a case similar to the case at bar, Trohimovich v. C.I.R, 776 F.2d 873 (9th Cir. 1985), the Ninth Circuit Court of Appeals explained that an appellate court has the power to award sanctions when the appeal is dismissed for lack of jurisdiction. In that

case, the Ninth Circuit did not have jurisdiction over the appeal because the appellants filed their notice of appeal one hundred and thirty-four days after the United States Tax Court denied appellants' claim for relief: forty-four days beyond the ninety day time period for filing the appeal. Although the Ninth Circuit concluded in Trohimovich that it did not have jurisdiction to review the merits of the appeal, the court found it did have independent jurisdiction to impose sanctions against the appellant for abusive conduct. 776 F.2d at 875.

> "Our inherent jurisdiction to condemn and punish the abusive conduct of litigants and their attorneys who appear before us is separate and apart from our jurisdiction to adjudicate the merits of their claims. In the exercise of our inherent jurisdiction we may of course, inform ourselves of the nature and extent of apparent misconduct and we may condemn it as abusive. Our condemnation is not the exercise of our jurisdiction over the merits; it is an exercise of our inherent jurisdiction." Id.

Accordingly, MOORE'S unsupported contention that the Ninth Circuit cannot impose sanctions because the Court otherwise lacks jurisdiction to consider his untimely appeal is directly contrary to established law. Accordingly, the Ninth Circuit appropriately sanctioned MOORE'S frivolous and vexatious conduct by awarding the TRUST DEFENDANTS their reasonable attorney's fees incurred on appeal under Section 502(g) of ERISA, 29 U.S.C. §1132(g).

CONCLUSION

For each of the foregoing reasons, Respondents TRUST DEFENDANTS respectfully request that the court deny Petitioner's Petition for Writ of Certiorari.

DATE: 10/17/94 STRAUSS, KISSANE & COOK

By: _____
MATTHEW T. KISSANE,
Attorneys for Respondents

APPENDIX

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EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, Section 502, 29 U.S.C. §1132 23

EMPLOYEE RETIREMENT INCOME SECURITY ACT

Sec. 502. (a) A civil action may be brought -

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this title or the terms of the plan;

. . .

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a).

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the

breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) the district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (1) of this section in any action.

(g)(1) In any action under this title (other than an action described in paragraph (2)), by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.